Tentative Rulings for March 4, 2014
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

12CECG02176 ***Elia v. Conner*** **(Dept. 402)**

14CECG00195 ***Mohammad v. Provident Savings Bank*** **(Dept. 501 at 10:00 a.m.)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG02661 ***Cadenas v. Select Portfolio*** **is continued to Tuesday, March 11, 2014 at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

2 **Tentative Ruling**

Re: ***Cavanaugh v. Sunrise Medical***
Superior Court Case No. 12CECG00045

Hearing Date: March 4, 2014 (Dept. 402)

Motion: Compel initial responses to form interrogatories, set one-general, form interrogatories, set one-employment law, special interrogatories, set one, request for production of documents, set one and sanctions

Tentative Ruling:

To grant Defendant's motions to compel Plaintiff to provide initial responses to form interrogatories, set one-general, form interrogatories, set one-employment law, special interrogatories, set one, and request for production of documents, set one. (Code of Civil Procedure sections 2030.290(b), 2031.300(b).) Plaintiff to provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant Defendant's motion for sanctions. Wendy Cavanaugh is ordered to pay monetary sanctions to the law offices of Littler Mendelson, P.C. in the amount of $570 within 30 days after service of this order. CCP §§2030.290(c), 2031.300(c).

Pursuant to California Rules of Court, rule 391(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 3/3/2014 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Siddique v. Maxwell et al.***, Superior Court Case No. 12CECG02604

Hearing Date: **March 4, 2014 (Dept. 402)**

Motion: Demurrer to Second Amended Complaint and Motion to strike

Tentative Ruling:

To sustain the demurrer to the third cause of action without leave to amend. (Code Civ. Proc. § 430.10(e).) To take the motion to strike off calendar as moot in light of the ruling on the demurrer. Defendants shall file their answer(s) to the Second Amended Complaint within 10 days of service of the order by the clerk.

Explanation:

In short, the third cause of action alleges that defendants committed fraud by falsely representing that the Lasik surgery would be performed with a laser only and that no blade would be used, and/or failing to disclose that a blade would be used in the surgery.

"The elements of fraud that will give rise to a tort action for deceit are: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."' (*Engalla v. Kaiser* (1997) 15 Cal. 4th 951, 974.)

For the first time in the SAC plaintiff has attached and incorporated by reference the Groupon ad at issue. In ruling on a demurrer, facts appearing in exhibits attached to the complaint are given precedence over inconsistent allegations in the complaint. (*Holland v. Morse Diesel Int'l, Inc.* (2001) 86 Cal.App.4th 1443, 1447.) The ad discloses that the doctor creates the flap with a microkeratome (a type of blade), and that a laser is then used to reshape the cornea.

There is no misrepresentation of fact. The ad disclosed exactly what plaintiff alleged it failed to disclose. The remaining issues raised in the opposition go to the issue of informed consent, which is addressed in the second cause of action. As plaintiff has failed to allege any misrepresentation of fact, the demurrer to the third cause of action is sustained without leave to amend.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 3/3/2014 .
(Judge's initials) (Date)

03 **Tentative Ruling**

Re: ***California Specialty Printing, Inc. v. Stewart***
Case No. 13CECG02816

Hearing Date: March 4th, 2014 (Dept. 402)

Motion: Defendants' Demurrer to First Amended Complaint

Tentative Ruling:

To overrule the demurrer to the first amended complaint. (Code Civ. Proc. § 430.10(e), (f).) To order defendants to file their answer to the FAC within 10 days of the date of service of this order.

Explanation:

Defendants demur to the breach of contract and specific performance causes of action, contending that they are mutually inconsistent because the breach of contract claim seeks legal remedies and the specific performance claim is based on the theory that legal remedies will not be sufficient to provide a complete remedy for plaintiff's harm. (*Morrison v. Land* (1915) 169 Cal. 580, 586-587.) However, plaintiff is entitled to plead inconsistent theories of relief in its complaint.

"A complaint may allege inconsistent theories of a cause of action in the alternative, including theories seeking specific performance of an agreement, or in the alternative, damages for the breach thereof; and, the court may award damages if plaintiffs are not entitled to specific performance." (*Brandolino v. Lindsay* (1969) 269 Cal.App.2d 319, 324, internal citations omitted.)

"A plaintiff can request such alternate remedies for equitable relief or legal damages in her or his complaint, but may not be awarded both to the extent such an award would constitute a double recovery, e.g., a plaintiff/purchaser of real property cannot receive both the property itself by a specific performance decree and also damages measured by payments he or she made towards the purchase price." (*Rogers v. Davis* (1994) 28 Cal.App.4th 1215, 1220, internal citation omitted.)

Therefore, to the extent that defendants argue that plaintiff's breach of contract and specific performance causes of action are inconsistent and thus fail to state valid claims, the demurrer is without merit.

Defendants also contend that plaintiff cannot seek recovery of the full purchase price of $280,000 because the contracts contain a liquidated damages clause that limits the amount of damages for failure to perform under the agreement to only $10,000. The liquidated damages clause is contained in the escrow instructions, which are attached to the FAC at Exhibit C, page 4. The clause states:

> LIQUIDATED DAMAGES: IT IS UNDERSTOOD AND AGREED THAT IN THE EVENT THAT BUYER BREACHES ANY CONDITION OR TERM OF THIS ESCROW, RESULTING IN A FAILURE TO CLOSE ESCROW, AND A CANCELLATION OF ESCROW, THE BUYER SHALL BECOME OBLIGATED TO SELLER FOR LIQUIDATED DAMAGES IN THE AMOUNT EQUAL TO THE BUYER'S DEPOSIT IN ESCROW, LESS ONLY ESCROW FEE AND COSTS. THE PARTIES AGREE THAT INSOFAR AS THE ACTUAL AMOUNT OF LIQUIDATED DAMAGED [*sic*] SUSTAINED BY SELLER WOULD BE DIFFICULT TO

DETERMINE, THE AMOUNT SET FORTH ABOVE IS DEEMED JUST AND EQUITABLE, AND SHALL BE THE TOTAL AMOUNT OF LIQUIDATED DAMAGES DUE SELLER FROM BUYER IN THE EVENT OF SUCH A CANCELLATION. (Exhibit C to FAC, p. 4.)

However, the escrow instructions also state under the heading "CONTROLLING DOCUMENTS AND LEGISLATION" that "Unless specifically stated, these instructions are NOT intended to cancel, modify or supersede the terms of any purchase agreement by and between the parties, including but not limited to inspections, repairs, warranties or possession. The Offer to Purchase (Asset Sale) executed by both buyer and seller on July 22, 2013 shall be entered into and made part of these escrow instructions." (Exhibit C to FAC, p. 3.)

Therefore, it appears that the escrow instructions were not intended to supersede, cancel or modify the terms of the Offer to Purchase or Asset Purchase Agreement. The Offer to Purchase and Asset Purchase Agreement do not contain a similar liquidated damage provision. The Offer to Purchase refers to the $10,000 payment as an "earnest money deposit", which "shall apply as a credit against the down payment at the closing hereof." (Exhibit E to FAC, p. 2, § 1.03.) The Offer to Purchase also states that if the buyer fails to complete the transaction, then "any funds or deposit shall be forfeited to the Seller." (*Id*. at p. 4, § 4.02.) The Asset Purchase Agreement also describes the $10,000 payment as an "earnest money deposit." (Exhibit B to FAC, p. 2, § 2.1.) The agreement also indicates that the final purchase price of $280,000 will be reduced by $10,000 when the transaction is completed. (*Id*. at p. 2, § 2.2.)

Thus, it appears that the parties intended that the $10,000 payment act as an earnest money deposit against the purchase price, and that defendants would be credited with $10,000 off the purchase price at the closing of the sale. While the deposited funds would be forfeited to the seller if the buyer failed to complete the transaction, there is no indication in the controlling agreements that the $10,000 payment was intended to represent liquidated damages, and that the seller would not be able to seek damages based on the full purchase price in the event that the buyer reneged on the transaction. At most, there is conflicting evidence on the issue of whether the seller is limited to only $10,000 in liquidated damages based on the escrow instructions, and this issue is best resolved later on summary judgment or at trial. However, any conflict in the various agreements is not so great as to make the complaint uncertain, nor does it mean that plaintiff has failed to state a claim. The court will not, therefore, sustain the demurrer based on the liquidated damages clause.

Defendants also argue that the complaint is uncertain and fails to state a claim because the Offer to Purchase references Addendum A, but Addendum A is missing from the exhibits to the FAC. According to defendants, Addendum A contains the contingencies that the seller needed to fulfill before the agreement could be completed. Without the Addendum, defendants argue that it is impossible to know what plaintiff needed to do to perform under the agreement.

However, plaintiff contends that there was no Addendum A to the Offer to Purchase, and that the reference to the addendum was an error in the offer. Plaintiff claims that all the required contingencies were listed in the offer itself, and that defendants later executed a "contingency removal" document.

The Offer to Purchase does state, at section 3.01, that "Sellers [*sic*] contingencies are attached as Addendum A." However, no such addendum is attached to the copy of the offer submitted as an exhibit to the FAC. Plaintiff claims that there never was an addendum, and that all required contingencies were listed in the offer. In any event, regardless of whether the addendum is missing or never existed, plaintiff has adequately alleged that it performed all required duties under the agreement, which is all that is required in order to show performance in a breach of contract claim.

According to Code of Civil Procedure section 457, "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance." (Code Civ. Proc., § 457.) Here, plaintiff has alleged ultimate facts stating that it performed all required conditions and things required to be done on its part, and was ready, willing and able to complete performance. (FAC, ¶ 19.) These allegations are sufficient to allege the element of performance of conditions precedent by plaintiff, so the court will not sustain the demurrer for any alleged lack of performance by plaintiff.

Next, defendants argue that plaintiff cannot state a claim based on the liquidated damages provision because plaintiff has not alleged any facts showing that the $10,000 deposit bears any reasonable relationship to the estimated damages, and is not an unenforceable penalty. Defendants cite to Civil Code section 1442, which states that, "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." (Civil Code § 1442.) Yet nothing in section 1442 requires a plaintiff to allege that there is a reasonable relationship between a liquidated damages provision and the plaintiff's actual damages as part of the complaint.

Also, under Civil Code section 1671(b), "Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." (Civ. Code, § 1671(b).) Thus, it would be defendants' burden, not plaintiff's, to demonstrate that the liquidated damages provision is not reasonable under the circumstances.

In any event, plaintiff is not alleging that it should be allowed to enforce the liquidated damages provision of the escrow instructions. In fact, plaintiff is arguing that the liquidated damages provision does not apply, and that it should be able to seek the full purchase price as damages. Therefore, the alleged lack of facts showing a reasonable relationship between the $10,000 payment and plaintiff's actual damages is irrelevant to the question of whether plaintiff has stated a claim for breach of contract or specific performance, and the court will not sustain the demurrer on this theory.

Defendants also complain that Exhibit B to the FAC, the Asset Purchase Agreement, is missing several pages, including the signature page, the integration clause, and the exhibit pages. Although not clearly argued, it appears that defendants are contending that the missing pages make the complaint uncertain. However, plaintiff has now submitted a notice of errata with the missing pages attached, so any

ambiguity has been resolved. Nor have defendants shown that the missing pages have caused any actual confusion on their part, and it appears that they already have the complete documents in their possession. Indeed, the complete Asset Purchase Agreement was attached as an exhibit to the original complaint, so defendants have not been prevented from seeing the entire agreement. Consequently, the court will not sustain the demurrer based on the missing pages to the agreement.

Defendants have also argued that it is unclear which of the agreements is the final agreement, and that the documents are incomplete and internally inconsistent as to whether the deposit is refundable and whether the liquidated damage clause controls. However, as discussed above, the escrow instructions indicate that the Offer to Purchase and Asset Purchase Agreements are the controlling documents. (Exhibit C to FAC, p. 3, "Controlling Documents and Legislation.") Also, to the extent that defendants complain that the copies of the agreements are incomplete, plaintiff has now remedied this defect, and in any event defendants have not shown any real confusion from the missing pages. The question as to whether the deposit is refundable or whether the liquidated damages provision controls does not create any real confusion either, as plaintiff clearly alleges that the Asset Purchase Agreement entitles it to the full amount of the purchase price. (FAC, ¶ 20.) Any ambiguities can be cleared up in discovery, so the court will not find that the alleged conflicts in the agreements render the complaint uncertain.

Defendants also demur to the second cause of action on the ground that plaintiff has not alleged facts establishing a breach of contract, or that plaintiff has the right to receive the equitable remedy of specific performance of the contract. However, defendants do not explain which elements of the specific performance claim plaintiff has failed to allege.

"The availability of the remedy of specific performance is premised upon well established requisites. These requisites include: A showing by plaintiff of (1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract." (*Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575, internal citations omitted.)

Plaintiff must also allege some breach of the underlying contract. (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 49.) "[S]pecific performance is a remedy for breach of contract, a cause of action which requires proof the contract was breached." (*Ibid*, internal citation omitted.)

Here, plaintiff has alleged the existence of a contract supported by adequate consideration, that defendants breached the contract, and that plaintiff's remedies under the law are insufficient because its damages will be difficult to calculate. (FAC, ¶¶ 25-28.) The contract appears to be sufficiently definite for the court to enable the court to enforce it, there is mutuality of remedies, and the requested performance is the same as that requested in the contract. Therefore, plaintiff has adequately alleged the specific performance claim, and the court intends to overrule the demurrer to the second cause of action.

Defendants have also demurred on the ground that plaintiff has not adequately alleged facts to support the claim that Stewart and The Kulit Group are alter egos of each other. It is not clear which causes of action plaintiff is challenging on this theory, or whether the defendants are attempting to challenge the sufficiency of the FAC as to only one of the two defendants, or both of them. It appears that defendants are arguing that plaintiff cannot state a claim against Stewart based on the actions of Kulit Group because it has not properly alleged an alter ego theory of liability. Regardless, it appears that plaintiff has adequately alleged facts to show that Stewart and Kulit were alter egos of each other.

"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and *vice versa*, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." (*Minifie v. Rowley* (1921) 187 Cal. 481, 487, internal citations omitted.)

"In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit, or adjunct' of its stockholders, but it must further appear that they are the 'business conduits and alter ego of one another,' and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons, does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization." (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 11.)

However, "It is not even essential, apparently, that actual fraud be specifically alleged or that the alter ego doctrine always be specifically pleaded in the complaint in order for it to be applied in appropriate circumstances… It therefore appears that the courts have followed a liberal policy of applying the alter ego doctrine where the equities and justice of the situation appear to call for it rather than restricting it to the technical niceties depending upon pleading and procedure. It is essential principally that a showing be made that both requirements, i.e., unity of interest and ownership, and the promotion of injustice by the fiction of corporate separate existence, exist in a given situation." (*First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 915, internal citation omitted.)

Here, plaintiff has alleged a number of ultimate facts showing that the alter ego doctrine applies to Stewart and Kulit. Plaintiff alleges that (1) Kulit Group was a mere shell, instrumentality and conduit through which Stewart conducted his business exercising complete control and dominance of the business to such an extent that any individuality or separateness of Kulit and Stewart does not and did not exist, (2) Stewart completely controls, dominates, manages and operates Kulit Group and has intermingled the assets of Kulit Group with his own assets to suit his own convenience

and purposes, and in fact he told plaintiff's representative that another company he owns, Machine World USA, uses the same address and gets free rent and labor, (3) Stewart has commingled funds and other assets of Kulit Group and/or failure to segregate funds of the separate entities and has diverted corporate funds to other than corporate uses, because he has allowed Machine World USA to utilize the same address without paying rent and labor, (4) Stewart used Kulit Group as a shell, instrumentality or conduit for the business of another corporation in that he uses Kulit Group to pay for the expenses of Machine World USA, (5) Stewart has held himself out to be personally liable for the debts of Kulit Group when he utilized his personal FICO score in negotiations, (6) Kulit Group was at all times inadequately capitalized and that its capitalization was illusory, (7) Stewart has used the business to procure labor, services, or merchandise for his own use, and he told plaintiff's representative that he ran a lot of personal expenses through the company, including children's clothing for school and personal trips, and (8) an adherence to the fiction of the separate existence of Kulit Group and Steward would permit an abuse of the corporate privilege and would sanction fraud and promote injustice. (FAC, ¶ 4a - h.) These facts are sufficient to allege that the alter ego doctrine should apply to Kulit Group and Stewart, so the court will not sustain the demurrer for lack of sufficient facts supporting the alter ego claim.

Finally, defendants argue that the court should "estop" plaintiff from asserting an alter ego theory here because this case involves a consensual contractual relationship rather than a tort, and such consensual relationships are not the proper subject matter for an alter ego claim. In support of their argument, defendants cite to *Cascade Energy and Metals Corp. v. Banks* (1990) 896 F.2d 1557, which is a Federal Court of Appeals case out of the Tenth District applying Utah law. It is questionable whether *Cascade* even applies here, since the federal court was not applying or interpreting California law.

Regardless, the court did hold that alter ego is rarely properly applied in breach of contract cases, because the parties to such transactions can usually protect themselves from loss with means other than piercing the corporate veil, such as personal guarantees, security agreements, or similar mechanisms. (*Id*. at 1577.) However, the court never held that it was not possible to pierce the corporate veil in breach of contract cases, only that it was less common. (*Ibid*.) Thus, to the extent that defendants rely on *Cascade* to contend that an alter ego theory can never apply to breach of contract claims, their argument is misplaced. Defendants have failed to show that plaintiff cannot rely on an alter ego theory to impose liability on Stewart based on the acts of Kulit, or *vice versa*. Therefore, the court intends to overrule the demurrer to the first amended complaint.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 3/3/2014 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(19) **Tentative Ruling**

Re: ***Kamciyan v. City of Fresno***
Superior Court Case No. 10CECG03562

Hearing Date: March 4, 2014 (Department 403)

Motion: by defendant to dismiss with prejudice

Tentative Ruling:

To deny without prejudice to bringing a motion which complies with California Rules of Court, Rule 3.1342(a) and seeks dismissal without prejudice.

If Oral Argument is request, it will be entertained on March 11th, 2014 at 3:30 p.m. in Department 403.

Explanation:

Code of Civil Procedure section 583.420(a)(2) permits a court to dismiss an action if it is not brought to trial within three years from the date the action was filed. Section 583.410(b) states that: "Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council." California Rules of Court, Rule 3.1342(a) states (emphasis added):

> "A party seeking dismissal of a case under Code of Civil Procedure sections 583.410-483.430 must serve and file a notice of motion ***at least 45 days before the date set for hearing*** of the motion."

That Rule was a basis for denying a motion for discretionary dismissal in *Franklin Capital Corp. v. Wilson* (2007) 148 Cal. App. 4th 187, 213-214. That case further notes that the City's request that the dismissal be without prejudice is impermissible. "On top of that, however, is what we perceive to be an even greater and absolutely dispositive reason to set aside the May 19 order: the fact that the Legislature has made it clear, and Supreme Court case law has recognized, that dismissals for procedural dereliction pursuant to Chapter 1.5 are to be without prejudice." (*Id.* at 214.)

The City is reminded that "A case citation must include the official report volume and page number and year of decision." California Rules of Court, Rule 3.1113.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 3/3/2014.
(Judge's initials) (Date)

(5) **Tentative Ruling**

Re: ***Obaid dba Quick and Save Market v. Ayala, Inc. et al.***
Superior Court Case No. 12CECG03881

Hearing Date: March 4, 2014 **(Dept. 403)**

Motion: By Plaintiff seeking leave to file a First Amended Complaint

Tentative Ruling:

To grant the unopposed motion pursuant to CCP § 473 (a)(1). The proposed First Amended Complaint is to be filed within **five days** of notice of the ruling. The time in which the complaint can be amended will run from service by the clerk of the minute order. All allegations in the First Amended Complaint that differ from those set forth in the original Complaint **must** be set in **boldface** type.

If Oral Argument is request, it will be entertained on March 11th, 2014 at 3:30 p.m. in Department 403.

Explanation:

On December 10, 2012 Plaintiff filed a Complaint alleging causes of action for breach of contract, fraud and common counts stemming from Defendants' issuance of payroll checks that were cashed at Plaintiff's store and then subsequently dishonored by Defendants' bank. The main Defendants filed an Answer on February 1, 2013 and the Defendants added as Does filed an Answer on October 24, 2013.

On January 10, 2014, Plaintiff filed and served a motion seeking leave to file a First Amended Complaint. No opposition has been filed. A proposed amended complaint has been submitted in accordance with CRC Rule 3.1324. Pursuant to CCP § 473(a)(1): "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading . . ." Judicial policy favors resolution of all disputed matters between the parties in the same lawsuit. Thus, the court's discretion will usually be exercised liberally to permit amendment of the pleadings. See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939 and *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596. The motion will be granted.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a),, no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 3/3/2014.
(Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Ruling

Re: ***Doe v. Green et al.***
Superior Court Case No. 12CECG02649

Hearing Date: March 4, 2014 (Dept. 501)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

To deny without prejudice. Petitioner must file an amended petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The petition fails to include the required photocopies of all doctor's reports containing a prognosis or diagnosis of the injuries. The petition fails to include a report of the minor's current condition. If confidentiality is an issue there are options available that the petitioner can pursue.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 3/3/14.
(Judge's initials) (Date)

03 **Tentative Ruling**

Re: ***Old Republic Insurance Company v. Hatcher***
Case No. 13CECG01913

Hearing Date: March 4th, 2014 (Dept. 501)

Motion: Plaintiff's Motion for Summary Judgment

Tentative Ruling:

To deny the plaintiff's motion for summary judgment, without prejudice. (Code Civ. Proc. § 437c.)

Explanation:

Plaintiff has not met its burden of presenting admissible evidence establishing all of the elements of its breach of contract claim.

"A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action." (Code Civ. Proc., § 437c(p)(1).)

With regard to each element upon which the plaintiff would bear the burden of proof at trial, the moving plaintiff "must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.)

"The assertion that an obligation exists due to a breach of contract is a legal conclusion. (*County of Los Angeles v. Security Ins. Co.* (1975) 52 Cal.App.3d 808, 817; *Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 413.) The assertion that a certain amount is owing is one of ultimate fact. (*Moss v. Crandell* (1961) 197 Cal.App.2d 220, 224.) The rule in summary judgment proceedings that requires giving great weight to admissions made in the course of discovery is not applicable to legal conclusions. (R.*J. Land & Associates Construction Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 425.) Further, declarations submitted in support of a motion for summary judgment must recite evidentiary facts, and may not consist of ultimate facts. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119.)

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388, internal citations omitted.)

Here, according to plaintiff's undisputed material fact number 1, plaintiff and defendant entered into a note with balloon payment. (Plaintiff's Undisputed Fact No. 1.) On the other hand, the declaration in support of the motion states that on May 25th, 2006, "defendant entered into the COUNTRYWIDE HOME LOANS, INC. NOTE WITH BALLOON PAYMENT." (Brauer decl., ¶ 2.) This statement appears to indicate that the original loan transaction was with Countrywide, not plaintiff. Also, the documents

attached to the declaration in support of the motion for summary judgment show that the loan was actually between defendant and Countrywide Home Loans, Inc., which is not the plaintiff in the present case. (Exhibit 1 to Brauer decl., Note with Balloon Payment.) There is no evidence that there was any agreement between defendant and plaintiff. The only evidence is that defendant entered into a loan agreement with Countrywide.

Plaintiff appears to be claiming that it is the assignee of the loan from Countrywide, but there is no such allegation in the complaint. In fact, the complaint alleges that the agreement was between plaintiff and defendant, even though the attached copy of the note shows that the agreement was between defendant and Countrywide. (Complaint, ¶ 5, and Exhibit to Complaint.) The declaration of Brauer does allege that plaintiff is the assignee of Countrywide, but there are no other facts alleged to support this conclusion. (Brauer decl., ¶ 1.)

In any event, since the assignment is not alleged in the complaint, plaintiff has not met its burden of showing that it has standing to seek a judgment based on the defendant's breach of the contract, or that there is a valid contract between plaintiff and defendant. Even where the defendant completely fails to object to any of the plaintiff's ultimate facts and legal conclusions, if the complaint fails to state a valid claim the plaintiff cannot obtain summary judgment, since there is no cause of action upon which summary judgment can be granted. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 382-383.)

Also, the declaration of Brauer does not properly establish that Brauer is the custodian of records for the loan transaction in question. Brauer claims that he is the "authorized representative" of Old Republic Insurance Company, and that he is familiar with the books, accounts receivable, and documents attached to the declaration. (Brauer decl., ¶ 1.) He also claims that plaintiff maintains a set of books of original entry for accounts receivable, and that "[t]hey constitute the principal record of our transactions with the defendant(s)..." (*Id*. at ¶ 4.) However, the attached printouts of the transactions appear to have been generated by Countrywide, not Old Republic. (Exhibit 2 to Brauer decl.) There is no evidence that defendant ever had any transactions with Old Republic, and the attached printouts only show transactions with Countrywide. Thus, the records attached to the declaration appear to contradict Brauer's claim that he is the custodian of records for the account in question. Indeed, it appears that the records were generated by Countrywide, not plaintiff, and there is nothing to show that the records are true and accurate. All of the evidence indicates that there was never a contract between plaintiff and defendant, and that defendant never made any payments to plaintiff.

Furthermore, it is not even clear that plaintiff has the right to obtain a judgment against defendant even assuming that plaintiff is the assignee of the Countrywide note. The note is labeled a "Second Mortgage", and it was secured by the property located at 7437 North Backer Ave., Fresno, California. (Exhibit 1 to Brauer decl.) However, the judicially noticeable records of the Fresno County Recorder indicate that the property at 7437 North Backer was sold at a foreclosure sale in September of 2008. (See attached printout from the Fresno County Recorder's Office, which the court intends to judicially notice under Evidence Code § 452(c) as an official act.)

Depending on the nature of the loan in question, the plaintiff may not be able to obtain a judgment against the defendant after the property has been sold at a foreclosure sale. If the loan was a "purchase money" mortgage, then plaintiff would probably not be able to obtain a deficiency judgment based on the loan.

"If the obligation is secured by a dwelling for not more than four families, occupied entirely or in part by the purchaser, and the deed of trust or mortgage secures repayment of a loan that was 'in fact' used to pay all or part of the purchase price of that dwelling, the purchase money antideficiency protections apply and the holder of the debt is barred from recovering a deficiency judgment." (Miller & Starr, 4 Cal. Real Est. § 10:285 (3d ed.), citing Code Civ. Proc. § 580b(a)(3).)

Also, "If a third party loan was obtained to purchase a one-to-four family home intended as a residence, and that loan is entitled to purchase money protection, then a refinance of that loan is also entitled to purchase money protection except as to the extent of any additional advance, if the refinance occurs after January 1, 2013. Even if the loan was refinanced prior to that date, case law would deem the refinance loan as purchase money if the same lender refinanced the original purchase money loan, but not necessarily if a new lender did so." (*Ibid*, citing Code Civ. Proc. § 580b(b).)

Here, there is insufficient evidence before the court to determine whether the note in question was a purchase money mortgage, or whether it was used for some other purpose. Plaintiff's evidence does not discuss the purpose of the loan, and it is unclear from the face of the note whether it was used to purchase a residence or for some other purpose. However, there is a real possibility that the plaintiff may not be able to obtain a judgment based on the note because the property has already been foreclosed upon. Therefore, the court cannot grant summary judgment until it has more facts regarding the nature of the note.

Furthermore, to the extent that plaintiff seeks an award of attorney's fees of $23,500 as part of the motion for summary judgment, the request is improper. Attorney's fees are generally awarded on a separate motion for fees after entry of judgment, not as part of a summary judgment motion. (Code Civ. Proc. §§ 1032(b); 1033.5(a)(10).) Also, plaintiff's counsel has not presented any evidence to support the claimed amount of fees, such as a summary of hours spent on the case, his hourly billing rate, and copies of billing records. Therefore, even if the court were inclined to grant the summary judgment motion, it would deny the request for fees as improper and unsupported by any evidence.

Therefore, the court intends deny the motion for summary judgment without prejudice. If the plaintiff brings a new summary judgment motion, it will need to address the issues above in the renewed motion.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 3/3/14.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Proctor v. Rodriguez et al.***, Superior Court Case No. 13CECG03760

Hearing Date: **March 4, 2014 (Dept. 501)**

Motion: Defendants' Demurrer to Complaint

Tentative Ruling:

To sustain the demurrer to the Complaint (Code Civ. Proc. § 430.10(e)), with 10 days' leave to file a first amended complaint in the name of the real party in interest. The time in which the complaint can be amended will run from service by the clerk of the minute order.

Explanation:

Karisty Proctor dba Studio Fifth Avenue Salon filed suit regarding defendants' use of a similar business name "Fifth Street Salon." Records subject to judicial notice show that "Studio Fifth Avenue" and "Studio Fifth" are fictitious business names owned by a California corporation named The Amicarelli Group, Inc., which is not named as a party to this action. (RJN Exhs. A, B.) Claims for injury or damage to a corporation or its property belong to the corporation, which is the real party in interest. (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107.) Proctor has no standing to maintain this action.

Leave to amend will be granted for the corporation to file suit. As noted in the moving papers, the corporation must be represented by an attorney. Proctor cannot represent the corporation. (See *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729-730.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 3/3/14.
(Judge's initials) (Date)

Tentative Ruling

Re: ***Agabekyan et al. v. AAA Northern California, Nevada & Utah Insurance Exchange***
Superior Court Case No. 13CECG03854

Hearing Date: March 4, 2014 (Dept. 501)

Motion: Compel responses to supplemental request for production of documents and supplemental form interrogatories, and sanctions

Tentative Ruling:

To grant Petitioners' motions to compel Respondent to provide initial verified responses to supplemental request for production of documents and supplemental form interrogatories, set one. (Code of Civil Procedure sections 2030.290(b), 2031.300(b).) AAA Northern California, Nevada & Utah Insurance Exchange to provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant Petitioner's motion for sanctions. AAA Northern California, Nevada & Utah Insurance Exchange is ordered to pay monetary sanctions to the law offices of Rodney C. Haron in the amount of $1,185 within 30 days after service of this order. CCP §§2030.290(c), 2031.300(c).

Pursuant to California Rules of Court, rule 391(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 3/3/14.
(Judge's initials) (Date)

Tentative Rulings for Department 502

(19) **Tentative Ruling**

Re: ***Rodrigeuz v. Cody Motorsports, Inc.***
Superior Court Case No. 09CECG00768

Hearing Date: March 4, 2014 (Department 502)

Motion: by plaintiff for preliminary approval of class action settlement and for class certification

Tentative Ruling:

To deny.

Plaintiff's counsel need make a motion to seal the First Amended Complaint due to violation of California Rules of Court, Rule 1.20(b). Such motion need be filed, along with a copy of the pleading with the Social Security numbers redacted, on or before March 11, 2014. A hearing will be held on such motion at 3:30 p.m. on March 27, 2014.

Defense counsel need make a motion to seal the Request for Judicial Notice it filed on November 20, 2011, also with a redacted copy of the filing, for the same reason, by the same date. That motion will be heard on the same date at the same time.

If oral argument is desired, it will be held on March 6, 2014.

Explanation:

1. Certification

a. Legal Standards

Where certification of a class is sought in conjunction with settlement, the motion is treated the same as if it were a motion solely for certification but for one factor – the proponent need not prove the case is manageable for trial. Everything else has to be proven, with admissible evidence, in order for due process concerns to be met. The Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812. The certification process ensures that is the case. This is a basic Constitutional requirement which applies to all class actions, federal and state.

That is why, when "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there

will be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." *Amchem Products v. Windsor* (1997) 521 U.S. 591, 620.

In *In Re Ephedra Products Liability Litigation* (S.D.N.Y. 2005) 231 F.R.D. 167, 170, the Court noted that the Supreme Court had reversed certification/settlement combinations each of the only two times the Court had addressed them (internal citations omitted): "In *Amchem*, the Court also rejected the argument made by the movants here that certification requirements are relaxed when litigation is to be obviated by a settlement. Proposed settlement classes sometimes warrant more, not less, caution on the question of certification." The only exception to the usual proof requirements was that no proof of trial manageability was required. Further (*Id*.):

> "[M]ovants also argue that the threshold for certification should be relaxed because they are asking for only preliminary approval of a settlement - just enough approval to disseminate its terms to class members-together with an initial certification that is subject to decertification later. They rely on a number of district court cases that granted conditional certification along with preliminary approval a settlement. However, an amendment to Rule 23 in 2003 Amendment deleted the provision that a class certification 'may be conditional.' According to the Advisory Committee that drafted the change, the change was made because a "court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." *See* Rule 23, Advisory Committee Notes to 2003 Amendments. Thus, Rule 23 must be rigorously applied even at this 'preliminary' stage.' "

The burden of proof for a plaintiff seeking class certification is preponderance of the evidence. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 322. See also *Richmond v. Dart Industries, Inc*. (1981) 29 Cal. 3d 462, 470, holding that a ruling on certification is subject to the "substantial evidence" test. And see *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal. App. 4th 133, 144, upholding denial of class certification because the moving party failed to present the necessary admissible evidence in support of his motion.

Accord *Bennett v. Regents of University of California* (2005) 133 Cal. App. 4th 347, 357, finding the same. And see *Carabini v. Superior Court* (1994) 26 Cal. App. 4th 239, 245: "In the absence of supporting declarations or other admissible evidence, indicating the communications were substantially uniform, plaintiffs have yet to establish one of the requisites for the maintenance of a class action." Just as one may not agree to a class, one cannot establish a class exists by mere argument or hearsay; due process requires proof.

b. Application to this Motion

The moving papers include no actual proof of financing documents. The proposed class representative admits that the purchases in question were made with his ex-spouse, who is not included as a named plaintiff. However, the exhibits to the First Amended Complaint show that the spouse was the lead applicant for one of the credit cards. There is no explanation of when the couple divorced, or how that affected the proposed class representative's ownership interest in the vehicles or his liability for the payments.

No practices with regard to financing or sale of maintenance agreements, or documents for other proposed class members are provided. The sole proof provided here is that the named plaintiff bought a maintenance plan with the language at issue. That is insufficient to permit certification.

2. Settlement Approval

More recent cases talking about review of class settlements are *Clark v. American Residential Services* (2009) 175 Cal. App. 4th 785 and *Kullar v. Foot Locker Retail* (2008) 168 Cal. App. 4th 116. *Kullar*, in particular, rejected any "presumption" of fairness in class action settlements as a general rule, and particularly with regard to the one in front of it (at page 129, emphasis added):

> "Class counsel asserted that information had been exchanged informally and during the course of the mediation session, but their declarations provided no specificity. The only specific was the repeated reference in the moving papers to several employee manuals that had been produced stating company policy simply as follows: Rest breaks and meal periods are scheduled based on business levels, hours worked and applicable state laws. Whatever information may have been exchanged during the mediation, ***there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see***. The record fails to establish in any meaningful way what investigation counsel conducted or what information they reviewed on which they based their assessment of the strength of the class members' claims, much less does the record contain information sufficient for the court to intelligently evaluate the adequacy of the settlement."

In *Clark v. America Residential Services, supra,* 175 Cal. App. 4th 785, the court vacated approval of class settlement coupled with class certification, the award of $25,000 each to two named plaintiffs, and more. The problem was that the plaintiffs presented "no evidence regarding the likelihood of success on any of the 10 causes of action, or the number of unpaid overtime hours estimated to have been worked by the class, or the average hourly rate of pay, or the number of meal periods and rest periods missed, or the value of minimum wage violations, and so on." (*Id*. at 793.)

See also *Kullar v. Foot Locker Retail, Inc., supra,* 168 Cal. App. 4th 116, 129: "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement."

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed." (*Id*. at 130.)

Here, there is no proof of what damages might be if all proved to be what plaintiff and class counsel hoped it would be. So there is no way to determine if the settlement amount is fair or unfair. There is not even a discussion of the named representative's damages, or of whether they would be split with the ex-wife. Perhaps he has no damage at all.

The fact that attorney's fees are set to be more than twice as much as the settlement for the entire class is also worrisome. There is no discussion of time spent on the case, of investigation done (or not done), no ball park determination of hours. There is, simply, no factual basis on which to grant even preliminary approval of the settlement or any aspect of it.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 3-3-14.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Moreno v. KIA Motor America, Inc.***
Case No. 12CECG03677

Hearing Date: February 4, 2014 (Dept. 502)

Motion: Plaintiff's Motion to Compel Further Responses to Requests for Production

Tentative Ruling:

To deny. If oral argument is requested, it will be heard on Wednesday, March 5, 2013 at 3:30 p.m. in department 502.

Explanation:

On January 25, 2013, plaintiff served the Requests for Production, Set One, at issue in this motion, by mail. (Ungs Decl. Exhibit A.) After numerous extensions, KIA served its responses on June 14, 2013. (Ungs Decl. Exhibit D.) That same day, it filed a motion for protective order seeking protection of some of the responsive documents as trade secrets or otherwise confidential. The motion for protective order was heard August 13, and denied by written order served August 23, 2013. (Ungs Decl. Exhibit G.)

The parties met and conferred in lengthy correspondence dated July 23, 2013, July 29, 2013, August 27, 2013, and September 11, 2013. (Ungs Decl. Exhibits E, F, H & I.) On September 13, 2013, 91 days after the discovery responses at issue were served, plaintiff filed a Request for Pretrial Discovery Conference. (Ungs Decl. Exhibit J.) Only one of the submitted meet and confer letters includes an extension of time to bring a motion to compel further responses – for two weeks only. (See Letter dated July 29, 2013, last paragraph, page 13, Exhibit F to Ungs Decl.) As a result this motion is untimely, and the court has no jurisdiction to rule on this discovery dispute.

Code of Civil Procedure section 2031.310, subdivision (c) currently provides with respect to motions to compel further responses to requests for production: "Unless notice of this motion is given within 45 days of the service of the verified response, or any supplemental verified response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waives any right to compel a further response to the demand."

Again, the responses were served by mail on June 14, 2013. The fifty days to file a motion to compel would have expired on Saturday, August 3, 2013, making a motion due Monday, August 5, 2013. On July 29, 2013, before this period expired, defendant stipulated to a two week continuance in writing, extending the time to file a motion to compel to Saturday August 17, 2013, meaning the motion was due Monday, August 19, 2013.

The July 29, 2013 letter is the last correspondence by defendant prior to the September 13, 2013 filing of the Request for Pretrial Discovery Conference provided in

the exhibits in support of plaintiff's motion. Accordingly, plaintiff has failed to demonstrate this court has jurisdiction to do anything but deny this motion.

In construing similar predecessor statutory provisions, the court in *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, concluded that the 45-day time limitation for motions to compel further answers to interrogatories and to compel production of documents was not " 'jurisdictional' in the fundamental sense, but is only 'jurisdictional' in the sense that it renders the court *without authority* to rule on motions to compel *other than to deny them*. " (*Id*. at p. 1410, italics added; see also *Vidal Sassoon v. Superior Court* (1983) 147 Cal.App.3d 681, 685.) "The Legislature has explicitly stated that unless a party moves to compel further response within 45 days of the unsatisfactory response, he waives any right to compel a further response." (*Professional Career Colleges Magna Institute, Inc. v. Superior Court* (1989) 207 Cal.App.3d 490, 494.)

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 3-3-14.
(Judge's initials) (Date)

Tentative Ruling

Re: ***Saint-Fleur v. County of Fresno et al.***
Superior Court Case No. 13CECG00838

Hearing Date: March 4, 2014 (Dept. 502)

Motion: Vacate judgment and leave to file amended complaint

Tentative Ruling:

To deny. The motion is stayed pending the outcome of the appeal filed on February 3, 2014. In the event oral argument is requested it will be held on March 6, 2014 at 3:30 in Dept. 502.

Explanation:

Moving party is seeking leave to set aside the judgment entered on November 6, 2014 and leave to file a second amended complaint. Moving party is currently appealing the judgment entered November 6, 2013, therefore any proceedings in the trial court upon the judgment are stayed. Code of Civil Procedure §916.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB (Judge's initials) on 2-18-14 (Date).